

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-7476

United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of
David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,
against

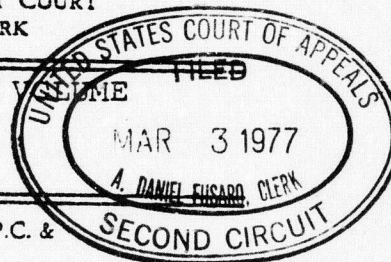
CHARLES GROSS, MABEL BLEICH, GROSS & CO., and
JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW
M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN,
WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate
of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL,
HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK
and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED
KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT
S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG &
GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg,
Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and
LAWRENCE J. BERKOWITZ,

*Additional Defendants on
Counterclaims-Appellants-
Cross-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX--SUPPLEMENTAL VOLUME
OF PLEADINGS
PAGES 572-575



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Andrew M. Newburger, Robert L.
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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

to

Supplemental Volume of Pleadings

Description

Page

Memorandum and Order of Owen, J., dated
March 21, 1974

572

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NEWBURGER, LOEB & CO., INC. as
Assignee of Claims of David Buckley
and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and
GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York
Limited Partnership, ANDREW M.
NEWBURGER, ROBERT L. NEWBURGER, LEO
STERN, ROBERT L. STERN, RICHARD D.
STERN, JOHN F. SETTEL, HAROLD J.
RICHARDS, SANFORD ROGGENBURG,
ADOLPHUS ROGGENBURG, NED D. FRANK,
ALEX AIXALA, FRED KAYNE, ROBERT MUH,
PAUL RISHER, CHARLES SLOANE, ROBERT
S. PERSKY, FINLEY, KUMBLE, UNDERBERG,
PERSKY & ROTH, a Partnership and
LAWRENCE J. BERKOWITZ,

Additional Defendants
on Counterclaims.
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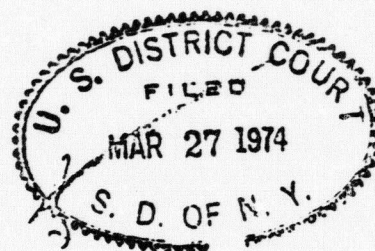
United States District Court
S. D. New York
March 21, 1974

Herbert Roth, New York, N.Y., for plaintiff and additional
defendants on counterclaims

Philip Mandel, New York, N.Y., for movant, Jeanne Donoghue

MEMORANDUM AND ORDER

Movant Jeanne Donoghue, although not named
as a defendant in the complaint, has nevertheless asserted
a \$75,000 "counterclaim" by denominating herself as a



71 Civ. 685



83

"defendant" in a joint answer served on her behalf and on behalf of all named defendants. Her standing having been attacked in various pleadings by this motion, Jeanne Donoghue seeks to establish her right to assert her counterclaim by either striking the said pleadings or by being permitted to intervene in the action pursuant to Fed. R. Civ. P. Rule 24(b).

Movant was a limited partner of defendant Gross & Co. (Gross), a brokerage firm, which ceased doing business in 1969 when she and its other partners became partners of plaintiff's predecessor Newburger Loeb (Newburger), movant becoming a limited partner of Newburger.

In this action, plaintiff Newburger, Loeb & Co., Inc. (Newburger, Inc.), corporate successor to Newburger, having been assigned the claim of one Buckley, brought suit against Gross and certain of its partners other than movant alleging damages in excess of \$249,000 based on "churning" in Buckley's brokerage account at Gross prior to its partners becoming partners of Newburger. Movant's counterclaim alleges \$75,000 damages by reason of plaintiff's failure to repay her her capital pursuant to provisions of the partnership agreement she entered into with Newburger at the time she became a limited partner.

Movant urges that hers is a permissible counterclaim either under New York law, citing Martinoff v. Triboro Roofing Co., 228 N.Y.S. 2d (1962), or, because plaintiff, by treating her as a "defendant" in various stipulations, motions and orders subsequent to her assertion of the counterclaim, has waived the right to now object to her participation. Specifically, movant points out that plaintiff denominated her a "defendant" in three stipulations, in a brief and affidavit before the Court on a prior motion and in an order entered thereon, and noticed her deposition as a "defendant" in this action. However, the Court does not need to resolve the issue on those grounds, since the Court may, in its discretion, allow the movant to intervene pursuant to Rule 24(b) of the Fed. R. Civ. P. See Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (2nd Cir. 1970); McCausland v. Shareholders Management Co., 52 F.R.D. 521 (S.D.N.Y. 1971); Dudley v. Southeastern Factor and Finance Corp., 57 F.R.D. 177 (N.D. Ga. 1972).

In view of the background of the action, the relationship of the cross-allegations and the facts asserted in support of a "waiver", supra, the Court feels impelled to exercise its discretion in favor of the retention of the counterclaim which can be effected by way of movant's intervention nunc pro tunc. Accordingly,

the motion is granted, intervention is allowed, and the various pleadings by both the plaintiff and the additional defendants on counterclaims attacking her standing, are stricken.

March 24, 1974

SO ORDERED:

[Signature]

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC.,
as Assignee of Claims of David
Buckley and Mary Buckley,

Plaintiff-Appellant-
Cross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH,
GROSS & CO. and JEANNE DONOGHUE,

Defendants-Appellees-
Cross-Appellants,

NEWBURGER, LOEB & CO., et al.,

Additional Defendants
on Counterclaims -
Appellants-Cross-Appellees.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JANE R. BOYNTAN, being duly sworn, deposes and says:

I am over twenty-one years of age, not a party to
this action, and reside at 210 East 15th Street, New York.
New York 10003.

On March 3, 1977, I served the attached Supplemental
Volume of Pleadings, Supplemental Volume of Exhibits and
addendum slips to the Exhibit Volumes in the above matter by
depositing true copies of the same in a postpaid, properly
addressed wrapper in an official depository under the exclusive
care and custody of the United States Post Office Department
within the State of New York.

Sworn to before me this
3rd day of March, 1977

Clara A. Lauro
Notary Public

Jane R. Boyntan
Jane R. Boyntan
CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

